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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 54

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *Appellant*

vs.

EPHRAM NESTOR

On Appeal From the United States District Court for the District of Columbia

MOTION TO AFFIRM DECISION BELOW

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No. 857

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *Appellant*

v.

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On Appeal From the United States District Court for the District of Columbia

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MOTION TO AFFIRM DECISION BELOW

The appellee, Ephram Nestor, pursuant to Rule 16 of the Revised Rules of this Court, moves to affirm the decision below on the ground that the question on which the decision of the case depends is so unsubstantial as not to need further argument.

QUESTION PRESENTED

Whether an alien may constitutionally be deprived of old age insurance benefits which were awarded to him in March 7, 1956 on the basis of contributions

under the Social Security Act made by him and his employers from December 1936 to January 1955, because he was deported in July 1956 for having been a member of the Communist Party in 1933-1939, the statute authorizing his deportation having been enacted in 1950, and the statute authorizing denial of social security benefits having been enacted in 1954.

STATEMENT OF CASE

Appellee, Ephram Nestor, was employed in the United States in employment covered by the Social Security Act from December 1936 until January 1955. (R. 51) Upon reaching retirement age in November 1955, he applied for social security benefits. (R. 37-41) On March 7, 1956, he was awarded such benefits in the amount of $55.60 per month effective as of November, 1955. (R. 51) In July of 1956 (R. 48-49) the appellee was deported from the United States under 8 U.S.C. 1261(a)(6), on the ground of membership in the Communist Party of the United States from 1933 to 1939. (R. 1-2, 4, 57b-57d) After his deportation, the Social Security Administrator, pursuant to the provisions of 202(n) of the Social Security Act, 42 U.S.C., Section 402(n), suspended payment of appellee's old age benefits from and after September 1956. (R. 52) The statute authorizing appellee's deportation was enacted in 1952 (carrying forward a provision first enacted in 1950). The statute authorizing the deprivation of appellee's old age benefits was enacted in 1954. (R. 2-4)

ARGUMENT

Appellant's jurisdictional statement misconceives the nature of the statute and the issue involved in this case. The heart of the government's position is the contention (J.S., p. 16), that the statute must be held

valid because, "It was not unreasonable for Congress to amend the social security program so as to confine the benefits payable thereunder to citizens and alien residents of this country." The statute involved here, however, is not a provision which denies benefits to non-resident aliens. In fact, Congress has consistently refused to enact any such legislation.[1]

Nor are we concerned here with the validity of the more limited provisions of Section 202(t) of the Social Security Act, 42 U.S.C. 402(t) which denies benefits to non-resident aliens who have only a minimal coverage under the Act, who have absented themselves from the country for more than six months, and who have emigrated to countries which deny benefits to American citizens in a similar status.[2] (See J. S., pp. 8, 17).

The statute involved here denies social security benefits not because of non-residence, but because of deportation for certain reasons. A non-resident who has not been deported, or one who has been deported for other reasons, retains his social security benefits. "The bill provides that all benefits payable on the earnings record of an individual who is deported from

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[1] See 100 Cong. Rec. 736, 83rd Cong., 1st Sess.; *Analysis of the Social Security System,* Hearings before a Subcommittee on Ways and Means of the House of Representatives, 83rd Cong., 1st Sess., p. 129. The refusal of Congress to make either citizenship or residence preconditions for eligibility to receive social security benefits is in accord with the practice of most countries which employ a contributory system of social insurance. See id at 1554. For a defense of this principle as being the only consistent basis upon which such a program of insurance can be administered see the testimony of Arthur Altmeyer, the first chairman of the Social Security Board, id at 910-11.

[2] Most countries with contributory systems of social insurance pay benefits to non-resident aliens who have earned them. See fn. 1, supra.

the United States because of illegal entry, conviction of a crime, or subversive activity shall be terminated." (H. Rep. No. 1698, 83rd Cong., 2d Sess., p. 25).[3] And, as acknowledged by the appellant, certain causes of deportation were excluded from the statute "because Congress thought they did not involve serious derelictions" (J. S., p. 18, fn. 15).

Thus, what the statute actually does is to penalize appellee because he had been, according to an administrative finding, a member of the Communist Party years before the enactment of the deportation statute and of Section 202(n). This question, which is the one presented by the case, is not discussed or even adverted to by the appellant in his jurisdictional statement. We think it is clear that in several respects the statute is unconstitutional as applied.

(1) It violates Article III, Section 2, and the Sixth Amendment because it inflicts a penalty without judicial trial and solely as a result of an administrative determination. *Wong Wing* v. *United States*, 163 U.S. 228; and see dissenting opinion of Justice Jackson in *United States* v. *Spector*, 343 U.S. 169, 174.

(2) The statute is invalid as *ex post facto* legislation since it "inflicts punishment for a past act which was

[3] The Senate Report which originally rejected the provisions of 202(n) described it as follows (S. Rep. No. 1987, 83rd Cong., 2d Sess. to accompany H.R. 9366 at p. 23):

> "The House-approved bill would have required that no monthly benefits be paid on the basis of the wages and self-employment income of an individual who has been deported for specified causes. Your committee has not had an opportunity to give sufficient study to all the possible implications of this provision, which involves termination of benefit rights under the contributory program of old age and survivor's insurance, and has therefore deleted this provision from the bill."

not punishable at the time it was committed." See *Cummings* v. *Missouri*, 4 Wall. 277, 319; *Ex parte Garland*, 4 Wall. 333, 377.

(3) The statute is invalid as a bill of attainder since it is "a legislative act which inflicts punishment without judicial trial." *Cummings* v. *Missouri*, *supra* at 323.

(4) The deprivation of appellee's benefits violates due process because it has no reasonable relation to the purposes and objectives of the social security program. See *Nebbia* v. *New York*, 291 U.S. 502, 525. The social security program does not limit benefits to worthy characters, but permits receipt of benefits by individuals convicted of murder, robbery, larceny, fraud and other crimes.[4] Since the program does not entail moral character as one of the elements for eligibility, it is irrational to single out the group of which appellee is a member as a category to whom benefits shall be denied.

(5) The conduct for which petitioner has been penalized was mere past membership in the Communist Party with no element of participation in or knowledge of unlawful advocacy. This conduct was protected by the First Amendment. *Yates* v. *United States*, 354 U.S. 298; *American Communications Association* v. *Douds*, 339 U.S. 382. To deprive the appellee of benefits because of such conduct obviously violates the Amendment.

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[4] The program does not take "into account his [the worker's] attitude, opinions, behavior or personal characteristics." See letter from Marion B. Folsom, former Secretary of Health, Education and Welfare, as set out in Hearings before the Committee on Finance of the United States Senate, 84th Cong., 2d Sess. on the Social Security Amendments for 1955, at p. 1319.

CONCLUSION

The decision below should be affirmed.

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